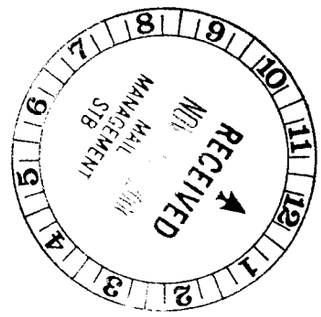
200402 200402

Whiteside & Associates

Transportation & Marketing Consultants



November 17, 2000

Office of the Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

Attn: Ex Parte No. 582 Sub No. 1: Major Rail Consolidation Procedures

Dear Mr. Secretary:

Pursuant to the Notice of Proposed Rule Making on October 3, 2000 in the above-described proceeding, please find enclosed the original and twenty-five copies of the Comments of Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission referred to as the **Wheat, Barley and Grains Commissions**.

Also please find enclosed an IBM compatible floppy diskette electronic copy of the enclosed statement.

Please receipt duplicate copy and return in the self-addressed stamped envelope for our records.

Respectfully submitted,

Terry C. Whiteside
Registered Practitioner representing
Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission

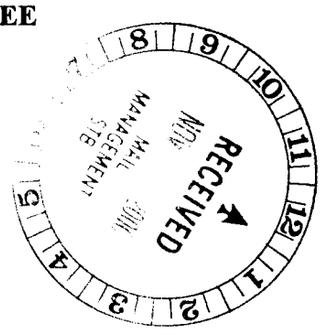
3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
FAX: (406) 252-3778
email: twhitesd@wtp.net

20402

BEFORE THE SURFACE TRANSPORTATION BOARD

ORIGINAL

COMMENTS
Of
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION



STB Ex Parte No. 582 (Sub-1)
Major Rail Consolidation Procedures
November 17, 2000

The above listed parties, referred to as the Wheat, Barley & Grains Commissions, herewith submit their comments on Notice of Proposed Rule Making in the above-styled proceeding issued by STB on October 3, 2000.

BACKGROUND

The Wheat, Barley & Grains Commissions thank the Board for holding this rule-making proceeding and hope the Board will look at the problems of rail consolidations and the market dominance created by past merger policy procedures as they develop future rail consolidation procedures. The most pressing question and the heart of this rule-making is what is best to address the public interest. In our mind every rail customer, the public, needs a competitive rail transportation system that provides fairly priced, safe and reliable service. To 'protect' the railroad industry, the Board has helped to create a system that is fraught with service problems, customer suffering, and rate gouging. The reality for many rail customers, due to an overly consolidated rail industry, is the railroad industry is characterized by lack of competition among the nation's railroads; whole states and complete industries are captive to a single railroad; and there have been thousands of cases of market abuse testified to at various STB hearings in the last several years.

DO THE PROPOSED RULES MEET THE PUBLIC INTEREST REQUIREMENTS?

The proposed rules outlined by the STB do not adequately meet the needs of the rail customer community at large. Throughout the marketplace, there is growing and continuing evidence of market power abuse and continuing abysmally poor levels of customer service. This Board has mounting pages of evidence of this market abuse, yet these proposed rules do nothing to reverse the continuing effects of market abuse by the railroads in future mergers. The STB needs to be clear on its rules. The courts require it. The Board is obligated to respond to what the participants in this Ex Parte proceeding ask for. However, the Board appears to have simply

summarized what the participants put forth in their initial statements. The law requires this Board to respond to the comments submitted by each party.

What is missing in these proposed rules is an effort by this Board to increase rail-to-rail competition throughout the rail industry. Indeed, the Board suggests that even limited forms of increased competition are tantamount to a "broad program of open access that would go beyond the public interest." For the STB to make this erroneous statement suggests to the Wheat & Barley Commissions that there is not a commitment by the STB in this rule-making, to achieve its stated objective of "enhancing competition." Will the new laws protect 3-to-2 or 2-to-1 rail customers in future mergers? What the rail customers asked for in this proceeding and what they are continuing to ask for in these comments is that the STB set out what the rules will be. The STB has not, in these proposed rules, set out standards to protect rail customers as requested by many of the parties in this proceeding. Despite the pro-competitive rhetoric, these proposed merger guidelines do not enhance competition or even seek to maintain it.

It appears that all the STB has done in this proceeding is to put forth rules that are simply a cookbook on how to write future merger applications.

The rule-making is likewise not strong on maintaining current levels of competition. For example, efforts to ensure that gateways are kept physically open but not economically, and without requiring service standards over them, will have, as a consequence, that even existing competition will not be maintained at current levels when a carrier doesn't desire to honor interchanges. The penalties for not keeping the gateways fully open as promised: none under this proceeding. This country is moving rapidly to a two-railroad end-game system. Enhancement of competition cannot occur after the two-railroad scenario is in place. The idea expressed by the STB in the original call of this proceeding was to introduce more competition (enhance) in the end-game. Enhancement would include:

1. Opening up previously closed gateways foreclosed as a result of mergers,
2. Giving rail customers, who have gone from 2-to-1 or 3-to-2 carriers in previous mergers, access to competitive rail,
3. Seeking to open up competitive access for rail customers where whole states, regions and industries have become captive by rail mergers.

It is only in this way that enhancement of rail-to-rail competition can occur in the final two-railroad monopoly system.

Thus, a continuing theme starts to emerge in this proceeding. This Board, in this proposed rule-making, asserts it is maintaining competition in future mergers, but it does not provide any standards, benchmarks or remedies which will allow judgments and restitution procedures to rail customers in the event the railroads don't live up (as they have not in the past) to their "promises." No one will know, in each future railroad merger, what the standards are going to be with these rules. They should be set by the Board, not developed by the merger applicants. The rules should be 1.) Specific, 2.) Easily definable, 3.) Enforceable, and 4.) Verifiable by all. Further, there must be a method of restitution to mitigate the losses incurred by rail customers. When the next merger starts the U.S. rail industry will be the in the 'end-game' –

the result will be a two-railroad system. There will be no room for error by the STB this time, yet these regulations, as proposed, do not provide direction or rules to protect those most affected by the mergers, namely the rail customers. In reality, these rules are the recipe for maximum discretion, not for maximum direction. What is required by the complete lack of rail-to-rail competition in this nation and the absence of competing railroads in this country by a responsible agency is maximum direction. For example, how will the Board define 'demonstrable benefits' in a future merger case? This order does not say.

The ever decreasing number of Class I railroads and the lack of intra-modal competition empowers them to behave in ways that control markets and entire industries. They have a history of discouraging economic development and stifling value-added industrial base drives by agricultural based states such as Idaho, Colorado, Montana, North Dakota, South Dakota, and Nebraska. There is no public benefit from mergers that allow carriers get away with employing their monopoly power to abuse rail customers.

Regulatory monitoring has not proven to mitigate or prevent economic damage to this nation's rail customers. Once a merger has failed a rail customer and the damage has been done, no amount of monitoring is going to undo the damage. What must be provided is economic incentive/disincentives to make sure the railroad promises are kept. Monitoring alone will not do that. What are needed are economic penalties for non-performance by the railroads that, coupled with the economic incentives to complete the merger, will tend to serve the rail customer as promised.

Look at the history of the past several rail mergers. They have not significantly improved service. They have not increased or even maintained existing competition levels in the market place. They have not resulted in lower rates. They have not resulted in increased efficiency. However, they have resulted in service disruptions, closed gateways, and increased transportation costs for rail customers. In proceeding after proceeding this Board has heard from hundreds of rail customers verifying the significant economic harm that continues to last for years compared with very limited benefits from previously approved mergers. The costs associated with service disruptions go far beyond the loss of revenue to the rail customer. Loss of business to the rail customer equates to loss of employee wages, lost sales and market share, increased trucking which costs local and state government, and attendant local air pollution. These increased costs and losses ripple throughout the local economies.

The customer and the Board must require the carriers promising merger benefits to deliver on the benefits or face economic sanctions, which mitigate damage done to the customers. The rail customers are not the ones who should be paying for these rail mergers. The railroads merge to increase revenues and bottom lines. In the event that a merger hurts a rail customer, the rail customer should be compensated. Instead the Board has left it up to the merging carriers to "make a good faith effort to calculate the net public benefits their merger will generate[1]." Then, the Board says it expects the "applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner[2]." In other words, the Board leaves the monopoly railroads with the maximum discretion and

[1] Proposed Rule §1180.1 (c) (1) Page 14, Notice of Proposed Rule Making, October 3, 2000
[2] Proposed Rule §1180.1 (c) (1) Page 14, Notice of Proposed Rule Making, October 3, 2000

minimum direction. This Board is obligated to protect those adversely affected by the merger, but instead seems too content after the horse is out of the barn to allow the railroads to propose new standards for keeping the door closed in the future.

The Board also suggests that the applicant railroads shall "propose remedies to mitigate and offset competitive harms[3]" in the event the carriers will, due to the proposed merger, be able to acquire and exploit increased market power. The Board had plenty of comments by rail customers to develop the 'proposed remedies' to mitigate and offset competitive harm, yet this Board allows the proponent monopoly railroads to propose remedies rather setting out the Board's own rules to protect rail customers.

The Board, in addressing transitional service problems, concluded that it will require "applicants to provide a detailed service plan[4]." However, if applicants provide such a plan and transitional service plans exceed the estimate by the applicant, the Board does not suggest any penalties or economic disincentives to mitigate the damages incurred by the public. In fact the Board shies completely away from conditions to mitigate damages stating, "Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition[5]." It assumed that this quote is a typo...that the Board meant "decreased competition." The merging carriers who stand to make greater profits due to the merger should be required to mitigate those rail customers who are placed at an economic disadvantage due to the merger. The disadvantaged rail customers have done nothing to 'earn' this disadvantage and the railroad parties enjoying an advantage over these customers should be required to mitigate the economic disadvantages that they are creating. The need for railroad restructuring is not paramount enough to allow this Board to define the public interest in such a manner that future rail mergers should disadvantage rail customers economically. Where are the proposed rules in this proceeding outlining the methods for calculating penalties or economic disincentives to mitigate damages incurred by the public?

TRANSNATIONAL ISSUES

Mitigation should include utilizing the other country's rules and regulations to mitigate impacts on rail customers. How will the STB rule on items such as final offer arbitration (FOA) rules available to Canadian rail customers? Will it be only available to Canadian rail customers and not U.S. based customers? If so, will the STB look at the negative effects upon U.S. customers where, on a Canadian rate to U.S. destination, a Canadian rail customer could get a FOA but an American rail customer could not get such a ruling even though both are competing for the same rail traffic movement?

The Board has not caught the proper balance between the railroads and the public interest in these proposed rules. The ICC/STB has affirmatively allowed the railroads to merge from over 41 Class I's in 1980 to only four major Class I's today. These proposed regulations do not serve to raise the level of competition in future mergers. In summary, these proposed merger rules let the merging applicants 1.) Decide what they want to merge, 2.) Decide what the impacts

[3] Proposed Rule §1180.1 (c) (2) (i) Page 14, Notice of Proposed Rule Making, October 3, 2000
[4] Proposed Rule §1180.1 (c) (2) (iii) Page 15, Notice of Proposed Rule Making, October 3, 2000
[5] Proposed Rule §1180.1 (d) Page 16, Notice of Proposed Rule Making, October 3, 2000

will be, 3.) Identify those that will be hurt by the merger 4.) Decide the level and degree of mitigation and 5.) Develop alternate plans about how they will develop competition for themselves. The Wheat & Barley Commissions respectfully suggest that these proposed rules do not adequately protect rail customers.

SUMMARY

1. The Board should adopt merger policies that do not allow any further lessening of rail-to-rail competition. The key merger criterion for measuring adverse effects should be the effect of all future rail mergers on rail customers who pay the freight bills. Without rail customers, railroads don't exist. The goal of future regulatory oversight thus should be to prevent future competition-lessening rail mergers. These proposed rules do not prevent future lessening of competition.
2. The Board should adopt a merger policy that in all future rail mergers, all rail customers should have the right to rail-to-rail competition as a matter of national rail policy and for those rail customers that do not have rail-to-rail competition; this Board should adopt a responsible regulatory relief system.
3. The Board should adopt a pro-competitive stance in every action and decision.
4. If the Board does not feel it has the authority to act in a pro-competitive stance it should immediately seek such authority.
5. The Board should develop workable rules that provide realistic, reasonable, and fair protection methods for small captive rail customers that today have no competitive rail choice. The Board should respond to participants' issues brought forth in their initial statements and not merely summarize the results.
6. These rules that are being promulgated by the Board should provide maximum direction and minimum discretion to the merger applicants as this nations moves to the end game of a two-railroad monopoly system.
7. Preserving and fostering rail competition should be the preferred solution over regulatory oversight. However, in areas where rail competition is not possible, reasonable regulatory oversight must be economically available to rail captive customers.
8. Economic regulation and competition are both parts of the whole and must be promulgated to have the effect of providing rail customers with adequate service and reasonable rates.
9. Rail mergers should be re-opened in the event rail competition is curtailed or lost, and the regulator should condition all rail mergers to enhance, not just maintain, competition in the future. Options such as competitive access, bottleneck pricing, terminal access, reciprocal switching, joint running rights, elimination of paper and steel barriers and arbitration to maintain competition must be available to mitigate anti-competitive effects of mergers. Such solutions do not constitute a "broad program of open access," and in fact are all consistent with the intent of the existing statute. In past railroad mergers, the Board has 'monitored' post merger performance rather than becoming pro-active by taking more significant corrective measures to correct loss of merger benefits. In short, the Board needs to become more aggressive on behalf of preserving and promoting competitive options.

10. Railroads should be held accountable financially for service failures emanating from a merger and customers should be compensated for economic losses suffered by the customer as a result of service diminishments.
11. The Board should support the provisions that were included in S. 621 and H.R. 2784 or H.R. 3446 during the 106th Congress, and will undoubtedly be included in new legislation next year, as ways to increase competition in the railroad industry without increasing regulation. In the alternative, the Board should take a pro-active stance on competition and forward its own legislative proposals that would grant the authority the Board thinks it would need to promote competition among the remaining railroads.
12. The Board should require pricing over bottlenecks, competitive access in terminal areas, mandate reciprocal switching and develop surrogates for competition for those captive rail customers that have been left without rail-to-rail competition.

Submitted by:

Terry Whiteside,
Registered Practitioner
Whiteside & Associates
3203 Third Avenue North, Suite 301
Billings, Montana 59101
Phone: (406) 245-5132
Email: twhitesd@wtp.net

November 16, 2000
Date:

For:
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
OREGON GRAINS COMMISSION
NEBRASKA WHEAT BOARD
SOUTH DAKOTA WHEAT COMMISSION
WASHINGTON BARLEY COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that the above described Comments of the Wheat, Barley & Grains Commissions has been duly served on all Party of Record identified on service list via first class mail in the United States Postal Service this 17th day of November, in the USPS station in Billings, Montana 59101.

Tara Mattson, Whiteside & Associates
3203 Third Avenue North, Suite 301
Billings, MT 59101
Phone: (406) 245-5132